United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4227

United States Court of Appeals

FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL UNIONS NOS. 1212, 4, 45, 202, 1200, 1220 and 1228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

CBS, INC., *Intervenor.*

On Petition to Review an Order of the National Labor Relations Board

BRIEF OF PETITIONERS INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.

LAURENCE J. COHEN
RICHARD M. RESNICK
ROBERT D. KURNICK
SHERMAN, DUNN, COHEN & LEIFER
Suite 801
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID I. ASHE
ASHE & RIFKIN
225 Broadway
New York, New York 10007

Attorneys for International Brotherhood of Electrical Workers, AFL-CIO, et al.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.,	)	
Petitioners,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	No. 76-4227
Respondent,	)	
and	)	
CBS, INC.,	)	
Intervenor.	)	

BRIEF OF PETITIONERS,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, et al.

PRELIMINARY STATEMENT

The Decision and Order of the National Labor Relations Board (hereinafter "Board") here under review is captioned CBS, Inc., and International Brotherhood of Electrical Workers, AFL-CIO, and Local 4, Local 45, Local 202, Local 1200, Local 1212, Local 1220 and Local 1228, International Brotherhood of Electrical Workers, AFL-CIO, and is reported at 226 NLRB No. 85 (October 19, 1976). The members of the Board who participated in the decision were John H. Fanning, Howard Jenkins, Jr., and John A. Penello.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether, in the circumstances of this case, the Board erred by dismissing the complaint issued by the Board's General Counsel which alleged that CBS violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 151 et seq (hereinafter "Act")[1/] by refusing to meet or negotiate the terms of a collective bargaining agreement with the petitioners herein (who are referred to collectively throughout this brief as "Union" or "IBEW"), while representatives of another labor organization served as members of the IBEW's negotiating committee.

STATEMENT OF THE CASE

I. Proceedings Below.

As a result of an original and amended charge filed by the Union (A. 4, 7),[2/] the Board's General Counsel issued a complaint dated December 5, 1975,[3/] alleging that CBS violated Sections 8(a)(1) and (5) of the Act by refusing to meet with the IBEW to negotiate the terms of a collective bargaining agreement because of the presence of representatives of another labor organization (National Association of Broadcast Engineers and Technicians, hereinafter referred to as "NABET") as members of the IBEW Negotiating Committee (A. 10).

1/ These and other pertinent portions of the Act are reproduced in an addendum at the conclusion of this brief.

2/ References to the Appendix of the Parties will be designated throughout as "A."

3/ Unless otherwise indicated, all dates referred to herein are 1975.

Following a hearing on February 24 and 25, 1976, Administrative Law Judge Martin S. Bennett issued a decision, dated June 23, 1976, in which he concluded that CBS had not violated the Act as alleged in the complaint and recommended dismissal of the complaint (A. 264). Thereafter, the General Counsel and the IBEW filed exceptions and supporting briefs with the Board. CBS filed a cross-exception and brief, and an answering brief. On October 19, 1976, the Board issued its Decision and Order affirming the decision of the Administrative Law Judge and dismissing the complaint in its entirety (A. 271).

II. Statement of Facts.

There is substantial agreement between the parties on the factual circumstances of the case. The only two witnesses at the hearing before the Administrative Law Judge were Andrew J. Draghi, chief negotiator for the Union, and James F. Sirmons, chief negotiator for CBS, and there is little if any difference between their accounts of the events in question.

CBS and the IBEW have been parties to collective bargaining agreements covering broadcast technicians since 1938. In 1951, the IBEW was certified as the collective bargaining representative of a nationwide unit of CBS broadcast technicians, and the parties have executed national agreements for that unit since 1952 (A. 147-149). The agreement in effect immediately preceding the events here in issue was a three-year agreement from October 1, 1972, through September 30, 1975 (G.C. Ex. 3; A. 256).

This case arose out of negotiations for a new agreement to succeed the 1972 contract.

A. 1972 negotiations and events under the 1972 - 1975 agreement.

During the 1972 negotiations, CBS sought certain changes in the terms of its agreement with the IBEW, because of the Company's development of new equipment. In order to convince the IBEW that it should agree to its requested changes, CBS imparted certain confidential information concerning the newly developed equipment (principally the electronic news gathering camera, known as the ENG or mini-cam). Because of its new equipment and the changes ultimately agreed to by the parties in the 1972 contract, CBS gained a competitive advantage over the other two major networks with respect to news gathering and production techniques (A. 155-158, 162-165).

Although an eight-week strike developed during the 1972 negotiations, and even though CBS had not sought any specific commitment or pledge from the IBEW with respect to the release of this confidential information, the parties agree that the Union did not reveal any of the confidential information it received from CBS (A. 118, 213-214, 243-244).

In accordance with Section 2.06 of the 1972 agreement (A. 256, at p. 27), approximately ten quarterly consultation meetings were held between CBS and the IBEW during the term of the 1972 agreement to discuss "subjects of mutual concern or interest...or matters necessary to the implementation of the Agreement." Although CBS provided additional confidential

information to the Union in the course of these meetings, and no written commitment or agreement restricting the Union's use of the information existed, the parties further agree that the Union did not release any of the information so gained (A. 118-119, 217). During the November, 1974, quarterly meeting, one of the IBEW representatives was a Gary Blum who worked for a station in Chicago, Illinois, which was a competitor of CBS. The Company at that meeting accepted the Union's assurance that Blum would not disclose information revealed at the meeting (A. 119-121).

B. The 1975 - 1976 negotiations.

In 1975, preliminary meetings were held between the parties on July 14 and 15, in Ossining, New York, for the purpose of exchanging initial proposals prior to the commencement of formal negotiations in San Diego, California, in September (A. 79-83, 177-179). The IBEW committee at those meetings contained no "outside representatives" (A. 81-82). About a month before those meetings, however, Sirmons had called Draghi to ask about rumors that the IBEW would have representatives of NABET and the International Alliance of Theatrical Stage Employees (IATSE) on its negotiating committee during the negotiations. Draghi confirmed that representatives of those unions would be part of the IBEW's negotiating committee, and Sirmons replied that "he was quite disturbed by the presence of individuals from both IATSE and NABET; and that he did not feel they would contribute anything to the bargaining process,

and, in fact, would impede negotiations." At no time during that telephone conversation, however, did Sirmons suggest that his objection was based on concern about disclosure of confidential information which CBS would be revealing during the negotiations (A. 79-81).[4/] On the morning of September 3, the date on which negotiations were to resume, Sirmons again called Draghi and asked about the presence of NABET and IATSE representatives on the IBEW negotiating committee. Again, Draghi confirmed that they would serve as members of the IBEW committee (A. 84-85).

The reasons why the IBEW wished to have representatives from the other broadcast unions on its committee were clearly described by Draghi:

> "I have felt for many years it would be in the best interest to all of the labor movement involved in network negotiations in that they [the unions] would coordinate their knowledge effectively against the networks, who are very coordinated against us." (A. 126.)

Draghi stated, for example, that in prior negotiations CBS had often told the IBEW that it could not make certain concessions because of IATSE's reaction, and on other occasions claimed that it had withheld concessions or deliberately discouraged claims from IATSE regarding certain conditions that had a bearing

---

4/ The parties stipulated that NABET is the collective bargaining representative of certain technicians and engineers employed by NBC and ABC, and that, at times material hereto, it has never represented employees of CBS, Inc. or any broadcasting company owned by CBS, Inc. (A. 75-76). IATSE, however, does represent certain employees of CBS and has a collective bargaining agreement with CBS covering those employees (A. 151).

on the IBEW. Thus, the presence of IATSE representatives during its negotiations with CBS, would place the IBEW in a better position to counter such techniques (A. 127). Similarly, Draghi wanted NABET representatives present because CBS had referred during negotiations with the IBEW, to certain actions taken by NBC and ABC vis-a-vis NABET. Therefore, the presence of NABET representatives would allow the IBEW to refute allegations concerning prior negotiations of NBC and ABC with NABET which could affect the IBEW-CBS negotiations (A. 131-132). Finally, it was revealed that IBEW representatives were present as observers during the NABET-NBC negotiations earlier in 1975 (A. 127-128).

For the Court's convenience, we summarize below the pertinent events at each of the separate negotiating sessions.

September 3. The parties began consideration of bargaining proposals, with both committees comprised generally of those persons who attended the July meetings in Ossining (A. 84, 178-179).

September 4-5. At the start of the September 4 meeting, Draghi introduced two IATSE representatives, Barnhart and Nimmo, as members of the IBEW bargaining committee. Sirmons objected to their presence, because they had no expertise with respect to the IBEW-CBS agreement, and because he believed their presence would inhibit the disclosure of confidential information involving jurisdictional matters. Nevertheless, because IATSE did have contracts with CBS, Sirmons ultimately agreed to bargain in their presence (A. 86-87, 181-183). In the course of this discussion, Draghi clearly stated that these non-

IBEW representatives were present only as members of the IBEW's committee (A. 88). For the balance of the September 4 and September 5 sessions, bargaining did proceed with the IATSE representatives present as members of the IBEW negotiating team, and jurisdictional matters were, in fact, discussed. In spite of the fears expressed by Sirmons, there is no indication that the bargaining was in any way impeded (A. 89-90).

September 8. Present as new members of the IBEW bargaining committee were James Nolan, a Vice President of NABET, and Shery Wolfe, an assistant to the Business Manager of IBEW Local 1212 in New York and an employee of a CBS competitor in the New York area (A. 90-91). Sirmons complained even about the presence of Wolfe, since she was employed by a CBS competitor. She did not attend any subsequent sessions (A. 90-91, 136-137). He also objected to Nolan's presence, since NABET had no contractual relationship with CBS and represented employees of its principal competitors, and CBS intended to discuss certain confidential information in the course of bargaining (A. 91-92, 184-185).[5/] The meeting ended when CBS refused to proceed with Nolan present (A. 93).

5/ With respect to the "confidentiality" issue, the parties stipulated (G.C. Ex. 2, A. 255) as follows:

> "Stipulated that during the course of the negotiations the Company intended to present information as to new equipment, and processes that come within the category of trade secrets and confidential business plans which would give the Company a competitive advantage over other broadcasters. It is further stipulated that the introduction and use of such new equipment and processes might require changes in the terms and conditions of employment as set forth in the collective bargaining agreement between the Company and IBEW."

September 9. The meeting was a short one, and Nolan was again present. Much of the discussion centered on the filing by CBS and the IBEW of unfair labor practice charges against each other. Draghi also requested that the parties discuss in Nolan's presence those proposals that would not require the disclosure of confidential information. Sirmons objected to this approach, saying that he would not allow the Union "to pick and choose" the subjects of discussion (A. 95-101).

September 11. Nolan was again present, and the parties again discussed their respective unfair labor practice charges. Draghi advised the Company that the Union would not permit CBS to coerce its bargaining committee concerning the selection of its members (A. 101-103).

September 16. Nolan was once again present, and Draghi continued to seek a formula which would allow negotiations to proceed without interference with the IBEW's right to choose the members of its own negotiating committee, and would allay CBS's alleged fears. He first offered, on behalf of his entire committee, a pledge of confidentiality that would be binding on both parties. He intended that this pledge would be fully binding on all members of his committee, including non-IBEW members, such as Nolan (A. 104, 138-139, 143-144). Sirmons stated that he doubted the seriousness of this offer and asked what assurances the Union could give him that the pledge would be kept. He asked if the IBEW or NABET would post a bond, and admitted during the trial of the case that the IBEW did not rule out the possibility of a bond. He further acknowledged that Draghi

suggested that the parties agree on the concept of a pledge of confidentiality and later work out the details (A. 104-105, 218-221). Draghi referred in the course of this meeting to the IBEW's prior record of maintaining the confidentiality of information previously furnished by CBS, and referred specifically to the attendance of Gary Blum at one of the quarterly meetings (referred to at p. 5, supra). He noted that CBS was willing on that occasion to accept the Union's assurance that discretion would be exercised by this "outside" member of the IBEW committee. Nevertheless, Sirmons remained unmoved (A. 106-109).

Draghi also proposed that the parties discuss in the presence of NABET representatives only those proposals which involved no issue of confidentiality, or only the Union's proposals (A. 110, 221-222). Sirmons flatly rejected any separation of discussions, claiming that the Company's proposals "so completely permeated the whole problem" that there could be no such separation (A. 222). Sirmons admitted, however, that many of the Union's proposals could be discussed without the disclosure of confidential information. These included wage increases for many job classifications, as well as proposals concerning pension benefits, vacations, overtime and travel expenses. Similarly, he admitted that no confidential information would be involved in discussions of certain of CBS's proposals, such as arbitration and picket line clauses (A. 223-229).

September 19. At this meeting, Edward Lynch, the International President of NABET, was present as a member of the IBEW negotiating committee. Sirmons raised the same objections, and no discussion of contract proposals took place at that meeting (A. 110-111).

September 22. Lynch was absent until about 11:00 a.m., and until that time there was discussion between the parties on contract proposals. Following his appearance, Sirmons refused to proceed (A. 111-112).

September 24. Sirmons raised the possibility of finding a way to negotiate without NABET being present, such as negotiating through subcommittees. Either at that meeting, or that of the 22nd, Sirmons stated that he didn't care what the IBEW did as far as passing on any information imparted at bargaining sessions to Lynch, as long as that was done outside the actual negotiating sessions. Draghi rejected the subcommittee suggestion, which he considered a subterfuge to avoid dealing with the IBEW when NABET representatives were present (A. 112-113).

September 29-30. At the September 29 meeting, it was apparent that the parties could not reach a new agreement prior to the September 30 expiration date of the 1972 contract. Near the close of that meeting, Draghi suggested a six-month extension of the old contract, pending resolution of the unfair labor practice charges before the Board, and asked that wages and other economic conditions in a new contract be made retroactive to October 1, 1975. The Company said it would consider the proposal and reply at a meeting the following day (A. 114-115).

When the parties met again on the 30th, the Company offered a counter-proposal concerning the extension, and expressly refused to discuss even the issue of wage retroactivity in front of Lynch (A. 115-117). Sirmons did not contend that discussion of the retroactivity of a subsequently negotiated wage increase would involve "confidential" business or technological information. Rather, revealing the real position of CBS with respect to bargaining in the presence of NABET representatives, Sirmons bluntly stated that "there wasn't one god-damn thing he was going to discuss in front of NABET" (A. 117).[6/]

Negotiations resumed between the parties on January 6, 1976, without NABET representatives present, but a new agreement had not been reached as of the date of the hearing in this case (A. 117, 192-193).[7/] During the January and February, 1976, meetings, the contract proposals of both parties were discussed (A. 117, 192-193). During those discussions, CBS provided certain confidential information which the parties have stipulated involved trade secrets (A. 203-208; G. C. Ex. 2, A. 255). CBS did not, however, seek any written guarantee

---

6/ Subsequently, the parties did reach an interim agreement, outside of the presence of any NABET representatives, which provided for extension of the 1972 agreement until February 29, 1976, and for retroactivity of wage rates and overtime back to October 1, 1975 (A. 110, 233; Resp. Ex. 2, A. 262-263).

7/ A new agreement was subsequently entered into between the parties on July 21, 1976, covering a three year period from October 1, 1975, to September 30, 1978.

from the IBEW concerning the disclosure of confidential information, and the question of possible remedies for a breach of confidentiality was not discussed. Similarly, no bond was posted (A. 234-236).

There are indications in the record other than those referred to above, and discussed at pp. 31-33, infra, that CBS did not refuse to bargain in the presence of NABET representatives because it feared disclosure of confidential information to the rival networks. Although Sirmons first stated that this fear of disclosure to a competitor was "the compelling reason" for CBS' objection, he added that, "we raised much broader objections than that and did not face that question in any way" (A. 211-212). In fact, it appears that CBS searched for a contrived legal basis for objecting to the presence of NABET representatives and then framed its protest at the bargaining table in terms of that legal position. Indeed, Sirmons admitted that "[w]e felt that the compelling reason, that is, the one that rested on the most solid legal base," was that based on confidentiality (A. 212). Later, he was even more specific:

> "I was proceeding on the basis of legal advice in the days prior to moving for an unfair labor practice charge against the Union. We had considered with our lawyers all the possible avenues that we thought were available to us, and we had had under study this question of whether it was an unfair labor practice for the Union to bring in a stranger union into our negotiations, thereby making it impractical if not impossible for the Company to negotiate fully and freely over its proposals, whether that was because of the confidentiality problems an unfair labor practice.
>
> "We were advised that it was. I was simply reflecting that advice." (A. 239.)

SUMMARY OF ARGUMENT

I.

The issue presented in this case is whether a union's inclusion of members of another union on its bargaining committee justifies an employer's refusal to bargain. That issue was resolved by this Court in General Electric Company v. NLRB, 412 F.2d 512 (2d Cir. 1969). General Electric established that each party to the collective bargaining process has the right to choose its bargaining representatives and a duty to bargain with the representatives chosen by its opposing party. In General Electric, as in the instant case, "outside" union representatives were included in the bargaining committee in order to prevent the employer from "playing off" one union against the other. This Court held that "either side can choose as it sees fit and neither can control the other's selection." Id., 517; Minnesota Mining and Manufacturing Company v. NLRB, 415 F.2d 174 (8th Cir. 1969), enforcing 173 NLRB 275 (1968); The Standard Oil Company v. NLRB, 322 F.2d 40 (6th Cir. 1963), enforcing 137 NLRB 690 (1962). Exceptions to this broad rule have been narrow and infrequent. Absent "extraordinary circumstances," Minnesota Mining, 415 F.2d at 177, presenting a "'clear and present' danger to the bargaining process," General Electric, 412 F.2d at 517, the right of both parties freely to select their own bargaining committees must remain unfettered.

Nevertheless, the Administrative Law Judge in this case held that G.E. was distinguishable because all the unions involved there represented General Electric employees; but NABET, the "outsider" in the instant case, did not represent any employees of

CBS. The courts and the Board, however, have refused to make this distinction the basis of an exception to the rule described in General Electric. Even when the "outsider" represented those employed by the employer's competitors the Board has found that a refusal to bargain violated Section 8(a)(5). Harley-Davidson Motor Company, 214 NLRB 433 (1974); AMF, Incorporated, 219 NLRB 903 (1975); Independent Drugstore Owners of Santa Clara County, 170 NLRB 1966 (1968).

II.

CBS has argued that the danger of NABET disclosing confidential information revealed during negotiations to CBS' competitors justified the refusal to meet with a bargaining committee which included NABET members. The Board and the courts, however, have also rejected the argument that possible disclosure of confidential information justifies a refusal to bargain. Roscoe Skipper, Inc., 106 NLRB 1238 (1953), enforced, 213 F.2d 793 (5th Cir. 1954); See NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir. 1952), enforcing as modified 86 NLRB 732 (1949). An employer cannot refuse to deal with representatives chosen by his employees because they also represent his competitor's employees. In Independent Drugstore Owners of Santa Clara County, 170 NLRB 1699 (1968), a case virtually identical to the instant case, an employer association refused to bargain with a committee which included outside representatives of the employees of its competitors. The association argued that confidential information revealed during the negotiations might be passed on to those competitors.

The Board rejected this argument, pointing out that the same danger of disclosure exists when one union bargains with separate competing employers and that any information revealed could easily be disclosed to outsiders in private. See General Electric, 412 F.2d at 519.

Thus the exclusion of NABET members would not have reduced the risk of disclosure. Such a risk would also exist if the IBEW represented employees of CBS competitors. Yet the courts and the Board have held that an employer cannot refuse to bargain with a union because it represents employees of a competing employer. NLRB v. Kentucky Utilities Co., 182 F.2d 810 (6th Cir. 1950); Pueblo Gas and Fuel Co. v. NLRB, 118 F.2d 304 (10th Cir. 1941).

III.

Although CBS relied on the confidentiality defense before the Board, the record on this case shows that its refusal to bargain was not in fact based on a fear that confidential information would be disclosed. CBS did not base its initial objection to NABET's presence on fear of disclosure. The Company also refused to discuss even non-confidential matters while NABET members were present. On this record, it appears that CBS objected to the presence of outsiders as such, and that the confidentiality defense is a makeweight which should not be made the basis of an exception to the rule described in General Electric.

A party alleging that it is entitled to such an exception bears a heavy burden. Yet CBS has presented only an unsupported assumption that NABET members would disclose confidential information revealed during negotiations with the IBEW. CBS has failed to demonstrate on this record the existence of the "extraordinary circumstances" needed to establish, as required by General Electric, "the type of clear and present danger to the bargaining process, that is required to overcome the burden on one who objects to the representatives selected by the other party" 412 F.2d at 520.

ARGUMENT

CBS' Refusal to Meet with the IBEW to Negotiate the Terms of a Collective Bargaining Agreement, Because of the Presence of Representatives of Another Labor Organization as Members of the IBEW's Bargaining Committee, Was a Violation of Sections 8(a)(1) and (5) of the Act.

I. Introduction

The basic issue in this case, as it was in General Electric Company v. NLRB, 412 F.2d 512 (2d Cir. 1969), enforcing in pertinent part 173 NLRB 253 (1968), is "whether a union's inclusion of members of other unions on its bargaining committee justifies an employer's refusal to bargain." 412 F.2d at 516. We respectfully submit that, as in General Electric, that question must be answered in the negative in the circumstances of this case, and that the Board erred in finding to the contrary. As we show below, the Board's decision is based on a misreading of both the result in and the rationale for this Court's landmark decision in General Electric.

The general rule is, of course, that each party to the collective bargaining process has the right to choose its representatives in bargaining negotiations, and the other party has a correlative duty to negotiate with those designated agents. Perhaps the leading statement of that rule is found in this Court's discussion in its General Electric opinion:

> "Section 7 of the National Labor Relations Act...guarantees certain rights to employees

> including the right to join together in labor organizations and 'to bargain collectively through representatives of their own choosing.' This right of employees and the corresponding right of employers, see section 8(b)(1)(B)..., to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme. In general, either side can choose as it sees fit and neither can control the other's selection, a proposition confirmed in a number of opinions, some of fairly ancient vintage." 412 F.2d at 516-517 (Emphasis added.)

This broad principle, enunciated in General Electric, has consistently been adopted over the years by the courts and the Board. See, for example, The Standard Oil Company, 137 NLRB 690 (1962), enforced, 322 F.2d 40 (6th Cir. 1963); American Radiator and Standard Sanitary Corporation, 155 NLRB 736, 743-45 (1965), enforcement denied on other grounds 381 F.2d 632 (6th Cir. 1967); Minnesota Mining and Manufacturing Company, 173 NLRB 275 (1968), enforced, 415 F.2d 174 (8th Cir. 1969); Harley-Davidson Motor Co., 214 NLRB 433 (1974); AMF, Inc., 219 NLRB 903 (1975).

The Administrative Law Judge below, however, accepted the contention of CBS that the General Electric decision is distinguishable because all of the unions who joined the IUE's bargaining committee in that case actually represented employees of General Electric. On that simplistic basis, and without discussing any of the many other cases bearing on this issue, the Administrative Law Judge recommended dismissal of the complaint. The Board, although expressly disavowing the Administrative Law Judge's suggestion that the IBEW may have been acting in bad faith in adding NABET representatives to its bargaining team,

as well as his comments concerning NABET's duty to disclose confidential information it received as a result of participating in the bargaining, otherwise affirmed his decision and dismissed the complaint in its entirety. As we now show, the distinction drawn by the Board, adopting its Administrative Law Judge, between the instant case and General Electric is legally unwarranted.

II. The Scope of the General Rule

As is apparent from the excerpt of this Court's opinion in General Electric, at pp. 18-19, supra, the basis of the right of employee representatives to name their own agents for the purpose of bargaining negotiations is Section 7 of the Act, which guarantees to employees the right "to bargain collectively through representatives of their own choosing,..." Moreover, Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Finally, under Section 8(a)(5), it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, ..." Employers, of course, enjoy the same right to designate their bargaining representatives, under Section 8(b)(1)(B), and this Court has concluded that under these sections "either side can choose as it sees fit and neither can control the other's selection,..." 412 F.2d at 516. Similarly, as the Board said in its decision in General Electric, at 173 NLRB 253, 254:

> "Our starting point is Section 7 of the Act. That section provides that 'employees

> shall have the right to...bargain collectively through representatives of their own choosing.' Included in the right to select representatives is the derivative right of the duly elected bargaining agent to select the bargaining team which will represent it at the negotiating table." (Emphasis added.)

The IBEW's reasons for including members of another union or other "outside" representatives on its bargaining team are essentially the same as the reasons such representatives were included in General Electric. This Court there noted that the unions representing General Electric's employees "had been concerned over the results of their separate efforts to bargain with General Electric" and that they felt that the company "had successfully followed a practice of divide and conquer" against the unions. 412 F.2d at 514. The union in General Electric claimed that the coordinated bargaining committee approach "reduce[d] the ability of the Company to play one off against the other", and this Court observed that the coordinated negotiating technique was "designed to strengthen the IUE's bargaining position, and that both sides know it." Id. at 519. Here, as shown above (pp. 6-7), the IBEW and the other two broadcast unions were utilizing the coordinated bargaining technique for precisely the same reasons. As IBEW chief negotiator Draghi testified, the unions wanted to "coordinate their knowledge effectively against the networks, who are very coordinated against us" (A. 126). This approach was desirable from the standpoint of all three network unions--IBEW, NABET and IATSE--and involved all three networks. Indeed,

as Draghi testified, the IBEW was a part of the NABET negotiating team in the latter union's bargaining with NBC earlier in 1975 (A. 127-128, 131-132).

We do not suggest that the rule announced in this Court's General Electric decision is immutable. In order properly to assess its breadth -- and the corresponding narrowness of the exceptions to the rule -- we must examine this Court's own view of the scope of its ruling. As the Court stated at 412 F.2d 517:

> "There have been exceptions to the general rule that either side can choose its bargaining representative freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical. See, e.g., N.L.R.B. v. ILGWU, 274 F.2d 376, 379 (3d Cir. 1960) (ex-union official added to employer committee to "put one over on the union"); Bausch & Lomb Optical Co., 108 NLRB 1555 (1954) (union established company in direct competition with employer); N.L.R.B. v. Kentucky Utilities Co., 182 F.2d 810 (6th Cir. 1950) (union negotiator had expressed great personal animosity towards employer). But cf. N.L.R.B. v. Signal Manufacturing Co., 351 F.2d 471 (1st Cir. 1965) (per curiam), cert. denied, 382 U.S. 985, 86 S. Ct. 562, 15 L.Ed. 2d 474 (1966)(similar claim of animosity rejected). Thus, the freedom to select representatives is not absolute, but that does not detract from its significance. Rather the narrowness and infrequency of approved exceptions to the general rule emphasizes its importance. Thus, in arguing that employees may not select members of other unions as 'representatives of their own choosing' on a negotiating committee, the Company clearly undertakes a considerable burden, characterized in an analogous situation in N.L.R.B. v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968), as the showing of a 'clear and present' danger to the collective bargaining process."

Similarly, as the 8th Circuit said in its Minnesota Mining and Manufacturing decision, supra, an employer is required to meet

with the designated representatives of its employees "absent extraordinary circumstances." And, in Standard Oil Company v. NLRB, 322 F.2d 40, 44 (6th Cir. 1963), the court concluded that:

> "Absent any finding of bad faith or ulterior motive on the part of the unions we conclude that it was the duty of the Company to negotiate with the bargaining committees of the Unions at the respective refinery plants even though the temporary representatives were present...We find no unusual or exceptional circumstances here that would warrant the Company's refusal to bargain." 8/

The general rule is thus clear. Absent "extraordinary" or "rare" circumstances, such as situations "infected with ill-will", which are required to sustain a finding of a "clear and present danger to the collective bargaining process", the right of both parties to the collective bargaining process freely to select the composition of their own bargaining committees must remain unfettered.

III. Exceptions to the Rule

The few exceptions permitted to this general rule to date, to which this Court referred in General Electric, illustrate the type of "extraordinary situations" which are required to

---

8/ See also American Radiator and Standard Sanitary Corp., supra, in which some members of the union's committee were employees of the Industrial Union Department of the AFL-CIO, with responsibilities to the employees of many other employers (presumably including competitors of American Radiator and Standard Sanitary Corp.).

justify a refusal to meet with a party's designated bargaining representatives.

A. In Bausch & Lomb Optical Company, 108 NLRB 1555, 1559 (1954), the Board noted "the innate danger involved were we to order this Respondent to bargain with a union which was its business competitor." (Emphasis supplied.) Moreover, the Board specifically stated in that decision that it regarded the facts there as "unique" (108 NLRB at 1562).[9/]

B. In NLRB v. Kentucky Utilities Company, 182 F.2d 810 (1950), the court -- unlike the Board -- sanctioned the employer's refusal to participate in negotiations with a representative of the union who was a terminated employee of the employer. The court based its ruling on the employee's open and repeated threats to the employer, concluding that his "expressed hostility to the respondent and his purpose to destroy the respondent financially made any attempt at good faith collective bargaining a futility." 182 F.2d at 813. It is apparent that the extreme circumstances which the

---

9/ In its General Electric opinion (173 NLRB at 254-55), the Board referred to its earlier Bausch & Lomb decision and noted that it "rested explicitly on the fact that the union stood in a position of a business competitor, which, unlike the employees it represented, stood to benefit if the employer could be forced out of business after being compelled to yield after inordinate demands."

Sixth Circuit relied upon in that case are totally absent here.[10/]

C. The reverse situation occurred in NLRB v. Garment Workers, 274 F.2d 376 (3d Cir. 1960), in which the court overturned the Board's finding that the union violated Sections 8(b)(3) and 8(b)(1)(B) by refusing to bargain with an employer who was represented for bargaining purposes by a former official of the same union. The court held that the employer's insistence on that particular representative evidenced that its offer to bargain in good faith was a sham.

In sum, the factual circumstances of the instant case do not even remotely resemble those in the very few exceptions to the broad general rule stated in General Electric and the other cases cited above.

10/ Compare, NLRB v. David Buttrick Co., 399 F.2d 505 (1st Cir. 1968).

Moreover, absent such avowed hostility on the part of the union representative, the employer may not be relieved of its duty to bargain because the representative is a terminated employee. See KDEN Broadcasting Co., 225 NLRB No. 6, 93 LRRM 1022 (1976); Renmuth, Inc., 195 NLRB 325 (1972); Racine Die Casting Co., 192 NLRB 529 (1971).

IV. CBS' Defenses

A. The "outsider" defense.

As noted at the outset of the Argument, the Administrative Law Judge, whose decision was adopted by the Board, rejected application of the General Electric rule to this case because NABET represented no employees of CBS, and the NABET representatives were therefore "outsiders" or "strangers" to CBS. Acceptance of that position would render meaningless the Section 7 right of employees to select "representatives of their own choosing." Accordingly, the Board and courts have rejected this "outsider" argument for many years. See, General Electric Company, supra; Minnesota Mining and Manufacturing Company, supra; Standard Oil Company, supra; American Radiator and Standard Sanitary Corp., supra. Indeed, in its own opinion in General Electric, the Board noted with approval the Sixth Circuit's earlier observation that: "A Union has the right to select outsiders to sit and assist a local bargaining committee."[11/] The Board also cited there (at n.15) the Sixth Circuit's earlier decision in NLRB v. Deena

---

11/ General Electric, 173 NLRB at 255, quoting from American Radiator and Standard Sanitary Corp. v. NLRB, 381 F.2d at 634.

Artware, 198 F.2d 645, 651 (1952), cert. den. 345 U.S. 906 (1953), holding (in the words of the Board), "that the Act does not require that the bargaining representatives be employed by the Company with which the Union is bargaining...."

Two recent cases are to the same effect. Harley-Davidson Motor Company, 214 NLRB 433 (1974); AMF, Incorporated, 219 NLRB 903 (1975). In both of those cases, representatives (and employees) of the AFL-CIO Industrial Union Department -- and thus, by definition, "outsiders" -- served as representatives on the union bargaining committees. Moreover, it is highly likely that some of the unions who are members of the IUD represent employees of competitors of Harley-Davidson and AMF. Nevertheless, in both cases, the employers were found to have violated Section 8(a)(5) by refusing to bargain because of the presence of the IUD representatives.[12/]

B. The confidentiality defense.

CBS will no doubt also argue here, as it did below, that it had the right to refuse to meet with the IBEW when NABET representatives appeared as part of its committee not only because NABET was an "outside" union, but also because of the danger that NABET, representing employees of the rival networks,

---

12/ In Amoco Oil Co., 221 NLRB 1104 (1975), the Board recently decided that even the statutorily recognized conflict between guards and other employees cannot bar production and maintenance employees from choosing, as one of their own collective bargaining representatives, a member of a unit of plant guards. The Board held that the employer could not refuse to meet with the member of the plant guard unit as a bargaining representative of the P&M employees, since the latter employees were entitled to choose whomever they wished as their collective bargaining representative, in spite of the provisions of Section 9(b)(3) of the Act.

might disclose information of a confidential nature which it obtained in the course of bargaining between CBS and the IBEW.

(1) Under certain circumstances not present herein, a defense of confidentiality could conceivably constitute the basis of an exception to the broad rule in General Electric. The Board and courts have rejected, however, for almost a quarter of a century, the argument that bargaining should be excused because a member of a union bargaining committee might be expected to do harm with confidential information disclosed in the course of bargaining. Roscoe Skipper, Inc., 106 NLRB 1238 (1953), enforced, 213 F.2d 793 (5th Cir. 1954). There, too, the respondent argued that the challenged representative was not employed by the employer and could convey secret information to others and thereby injure the respondent's business. The trial examiner, Board and court all found those contentions to be without merit. See also NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir. 1952), enforcing as modified 86 NLRB 732 (1949); North Brothers Ford, Inc., 187 NLRB 766 (1971).

The case most closely in point is the Board's decision in Independent Drugstore Owners of Santa Clara County, 170 NLRB 1699 (1968). There, as here, the employer (the Independent Drugstore association) refused to bargain with the Pharmacists Guild, which represented its employees, on the ground that the Guild's bargaining committee included a representative of the Retail Clerks Union. The Retail Clerks represented no employees

of the association but did represent employees of employers in competition with the association. And there, as here, the association argued, as a defense to the refusal-to-bargain charges against it, that "matters of a private nature, such as volume of business, cost of business, profits and losses, business practices, and future plans of business development" were to be discussed in negotiations, and that this "information [was] of the quality of trade secrets which Tupper [the Retail Clerks representative], in later negotiations with competitors of Respondent's members, might pass on to such competitors." 170 NLRB at 1702. The trial examiner, adopted by the Board, rejected that defense in the following terms, so clearly applicable to this case as well:

> "It is not unusual for a single union to negotiate with separate, competing employers, or with separate groups of employers when it represents the employees of each employer, but it has not yet successfully been argued that a conflict of interest would exist because of this fact so as to justify the refusal of one employer or one set of employers to deal with the representatives of his own employees merely because the same representative also represents employees of competing employers. I can see no greater danger that Tupper would reveal information gained in bargaining with Respondent to competitors than that involved in bargaining by one union with separate employers. If Tupper were to be excluded from bargaining meetings between the Guild and the Respondent, there is no possible way of preventing a member of the Guild's committee from relating to Tupper in private everything that had occurred at a bargaining session between the Guild and the Respondent in order to secure Tupper's advice. This procedure, however, would tend to impede bargaining rather than aid it." Id. at 1702-1703. (Emphasis supplied.)

The employer in General Electric also raised the specter of "conflicting interests", 412 F.2d at 519. This Court correctly noted, however, that some of the alleged dangers could exist "even if there were no members of other unions on a committee, if, for example, the unions were to meet together immediately before and after each bargaining session." Id.[13/] That observation is highly pertinent here, and casts further doubt on the legitimacy of CBS' claim, since Sirmons expressly stated that he didn't care what information the IBEW passed on to Lynch outside of the actual negotiating sessions (A. 112-113).

As the trial examiner observed in Independent Drugstore Owners, it is not unusual for a union to bargain with competing employers. It is natural to ask, therefore, whether, if the IBEW also represented NBC or ABC employees (and perhaps even more employees at those networks than at CBS), CBS could refuse to bargain with the IBEW on grounds similar to those advanced here. The Board and the courts have said, no. In NLRB v. Kentucky Utilities Co., 182 F.2d 810 (6th Cir. 1950), the employer resisted bargaining because the IBEW representatives worked for a rival utility -- the Tennessee Valley Authority. The Board and the Court rejected the argument. A similar argument was rejected in Pueblo Gas and Fuel Company v. NLRB, 118 F.2d 304 (10th Cir. 1941), where the employer claimed that his employees could not be represented by a union, a majority of whose members were employed in a rival industry.

13/ See, also, the observation to the same effect in Independent Drugstore Owners, quoted immediately above.

In other situations, the IBEW does represent employees of direct competitors, e.g. General Electric and Westinghouse, but no one has ever contended that either of those companies could refuse to bargain on the ground that the IBEW (or similarly situated unions) also represents employees of its direct competitor.[14/] Conversely, could the IBEW lawfully object if CBS introduced as its chief negotiator, an attorney who had previously represented NBC in its negotiations with NABET? We think not.

Similarly, would CBS' objection to NABET disappear if it represented a unit of 10 or 20 or 50 CBS employees at some location? We respectfully submit that the key to the legality of CBS' refusal to bargain is not an inquiry into which union represents how many employees of which employers. Rather, it turns on whether there are sufficient facts demonstrated on this record which would allow CBS to meet its "heavy burden" in establishing the "extraordinary circumstances", which are necessary for a conclusion that this case represents one of the rare exceptions to the rule stated in General Electric.

(2) On the record of this case, CBS has not met its required burden. Indeed, there is serious reason to doubt that its refusal to bargain was in fact based on a fear of disclosure of confidential information. First, a careful

---

14/ Logically, the alleged "duty" of a union to reveal information to its members employed by rivals would apply to IATSE in this case, as well as to NABET, since IATSE represents even more employees at NBC and ABC combined than it does at CBS. Yet, CBS dropped its initial objection to IATSE's presence on the IBEW committee.

examination of the record reveals that the "confidentiality" defense was an afterthought. As previously noted, prior to the initial meetings between the Union and the Company in July of 1975, even though Company spokesman Sirmons protested the announced presence of representatives of other unions on IBEW's committee in the forthcoming negotiations, he did not base his objection on the danger of disclosure of confidential information that would be imparted during bargaining. Nor did he distinguish between NABET and IATSE. Moreover, at the meetings of September 4 and 8, CBS objected to the presence of representatives of IATSE and an official of IBEW Local 1212 who is employed by a CBS competitor in the New York area. Although the Company ultimately relented on the presence of those persons, its initial position toward them is still another indication that its basic objection was to the presence of "outsiders" per se.

Second, it is undisputed that Sirmons refused to explore a number of admittedly non-confidential items in the presence of NABET representatives, including the retroactivity of a wage increase to be negotiated in the future, and announced that "there wasn't one god-damned thing he was going to discuss in front of NABET" (A. 117).

Third, when the IBEW offered a pledge -- which would have been binding on all members of the union committee (including NABET representatives) -- to protect any confidential information

received,[15] Sirmons' response was to question the seriousness of this proposal (A. 104-105, 138-139, 143-144, 218-221).[16] The IBEW did not even rule out the possibility of a bond to underwrite the pledge when suggested by CBS (A. 218-221).

CBS' true position in this case is most clearly revealed by its cross-exception filed with the Board in which it alleged outright that a union does not have any right under the Act, "to select as members of their negotiating committee persons who are not affiliated with the Unions."[17] Recognizing that this Court's decision in General Electric, as well as other cases, stand directly contrary to the position for which it contended, CBS simply urged that those cases were "wrongly decided and should not be followed herein."[18]

15/ In his discussions with Sirmons, Draghi stated explicitly that the outside union representatives were present only as members of the IBEW's bargaining committee (A. 88).

16/ That the IBEW's pledge was not an idle gesture is demonstrated by its observance of the confidential information it received in the course of the 1972 negotiations, although no formal pledge existed at that time, and even though those negotiations led to a bitter eight-week strike, as well as in the course of the quarterly meetings throughout the 1972-1975 contract. And, as discussed by the parties during the September 16 meeting, another "outsider" -- one employed by a competitor of CBS -- was in attendance at one of those quarterly meetings.

17/ Brief in Support of Cross-Exception, p. 2. CBS there defined "affiliated" as including "employees, agents, consultants, and attorneys retained by the Unions."

18/ Id. at p. 5.

Even if the basis of CBS' refusal to bargain was its fear that confidential information would be disclosed, that fear was based on nothing more than an unsupported assumption. Thus, CBS assumed that, since NABET represented no employees of CBS but did represent the employees of the rival networks, its representatives on the IBEW bargaining committee were under a duty to disclose to their members (or perhaps to the other networks) whatever confidential information they learned in the course of IBEW-CBS negotiations which would ultimately help NABET members. But the short answer is that there is not an iota of evidence in the record to support that assumption. Further, in the footnote to its decision, the Board expressly disavowed the Administrative Law Judge's conjecture as to NABET's duty to disclose to others any confidential information it obtained through its representatives sitting as members of the IBEW's bargaining committee.

In sum, whatever the merits of a confidentiality argument in some other context and on some other record, we submit that the instant record shows that its advancement herein is makeweight and that it was not the real reason

for CBS' refusal to bargain.[19] Hypothesis, speculation and fears are not adequate substitutes for facts, and there is nothing in this record by which CBS can demonstrate, in the words of this Court, "the type of clear and present danger to the bargaining process, that is required to overcome the burden on one who objects to the representatives selected by the other party." General Electric, 412 F.2d at 520. Accordingly, the Board's Decision must be reversed.

19/ Indeed, the record reveals that the "confidentiality" defense was carefully contrived, in order to present a case to the Board in the most favorable possible posture (A. 211-212, 239). We respectfully suggest that, under the General Electric criteria, the legal issue should be determined by the realities of bargaining, and not the other way around.

CONCLUSION

For all of the foregoing reasons, the Decision and Order of the Board in this case should be set aside and the case remanded to the Board with directions to find that CBS violated Sections 8(a)(1) and (5) of the Act, as alleged in the complaint.

Respectfully submitted,

LAURENCE J. COHEN
RICHARD M. RESNICK
ROBERT D. KURNICK
SHERMAN, DUNN, COHEN & LEIFER
1125 Fifteenth Street, N.W.
Suite 801
Washington, D. C. 20005

DAVID I. ASHE
ASHE & RIFKIN
225 Broadway
New York, New York 10007

Attorneys for International Brotherhood of Electrical Workers, AFL-CIO, et al.

March 1977

ADDENDUM

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. §§ 151, et seq.), are as follows:

Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Sec. 8(a) "It shall be an unfair labor practice for an employer -

(1) "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . ."

(5) "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Sec. 8(b) "It shall be an unfair labor practice for a labor organization or its agents -

(1) "to restrain or coerce...(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., Petitioners,	)	
v.	)	No. 76-4227
NATIONAL LABOR RELATIONS BOARD, Respondent,	)	
and	)	
CBS, INC., Intervenor.	)	

CERTIFICATE OF SERVICE

I hereby certify that two copies of Petitioners' brief, and one copy of the Appendix, have been served this 17th day of March, 1977, on the following, via first-class mail, postage prepaid:

Hon. John S. Irving, General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Charles G. Bakaly, Esquire
O'Melveny & Myers
611 West Sixth Street
Los Angeles, California 90017
Counsel for CBS, Inc.

Stephen M. Koppekin, Esquire
CBS, Inc., Law Department
51 West 52nd Street
New York, New York 10019
Counsel for CBS, Inc.

Laurence J. Cohen